

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

THOMAS A. DIBARTOLO,

Petitioner,

v.

STATE OF WASHINGTON,  
BERNARD WARNER and BOB  
FERGUSON

Respondents.

NO: 2:15-CV-0051-SMJ

**ORDER ADOPTING REPORT AND  
RECOMMENDATION AND  
DIRECTING TRANSFER TO  
NINTH CIRCUIT**

Magistrate Judge Hutton filed a Report and Recommendation on February 25, 2015, recommending Mr. Dibartolo's habeas corpus petition be transferred to the Ninth Circuit Court of Appeals. There being no objections, the Court **ADOPTS** the Report and Recommendation.

Petitioner, a Washington State prisoner currently housed within the Rhode Island Department of Corrections in Cranston, Rhode Island, brings this *pro se* Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28

ORDER ADOPTING REPORT AND RECOMMENDATION AND DIRECTING  
TRANSFER TO NINTH CIRCUIT -- 1

1 U.S.C. § 2254. Mr. Dibartolo has paid the \$5.00 filing fee for this action and the  
2 petition was filed on February 19, 2015.

3 Petitioner challenges his 1997 Spokane County jury conviction for First  
4 Degree Murder, for which he was sentenced to 320 months incarceration. Court  
5 records show that Petitioner previously challenged this conviction in a habeas  
6 petition filed in cause number 2:03-cv-00094-EFS (formerly LRS, RHW/MWL).  
7 The Honorable Robert H. Whaley dismissed that petition on May 4, 2004, ECF  
8 No. 25, having denied review of five unexhausted claims as procedurally defaulted  
9 and finding that the only exhausted claim was without merit. The Ninth Circuit  
10 Court of Appeals affirmed that decision and issued a Mandate on December 27,  
11 2004 (cause number 94-35528), ECF No. 32.

12 On October 23, 2009, the Honorable Edward F. Shea denied Petitioner's  
13 Emergency Petition for Extraordinary Relief, ECF No. 39, and on October 18,  
14 2010, the Ninth Circuit denied Mr. Dibartolo's request for a certificate of  
15 appealability (cause number 09-36067). Petitioner was instructed that if he  
16 wished to file a second or successive 28 U.S.C. § 2254 petition in the district court,  
17 he must first move in the Ninth Circuit Court of Appeals for an order authorizing  
18 the district court to consider that petition. *See* 28 U.S.C. § 2244(b)(3). Petitioner  
19 has presented no such authorization to this Court.

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1 In light of Petitioner's prior petition, the current petition will be treated as a  
2 second or successive petition under 28 U.S.C. § 2244. Again, the district court  
3 lacks authority to review successive habeas petitions filed without authorization  
4 from the Circuit Court of Appeals. 28 U.S.C. § 2244(b)(3)(A). Specifically, the  
5 habeas corpus statute provides:

6 **"Before a second or successive application permitted**  
7 **by this section is filed in the district court, the**  
8 **applicant shall move in the appropriate court of**  
9 **appeals for an order authorizing the district court to**  
10 **consider the application."**

11 *See* 28 U.S.C. § 2244(b)(3)(A); *see also* Ninth Circuit Rule 22-3.

12 When a second or successive petition is mistakenly submitted to the district  
13 court, that court shall refer it to the court of appeals. Ninth Circuit Rule 22-3(a).

14 Accordingly, **IT IS ORDERED** this case is **TRANSFERRED** to the Ninth Circuit  
15 Court of Appeals, pursuant to 28 U.S.C. § 1631 and Ninth Circuit Rule 22-3(a).

16 Petitioner is advised this transfer does not of itself constitute compliance  
17 with § 2244(b)(3) and Ninth Circuit Rule 22-3; he must still file an application for  
18 leave to proceed in the Court of Appeals and make the showing required by §  
19 2244(b)(2). Petitioner is directed to consult this statute and Ninth Circuit Rule 22-3  
20 for further information.

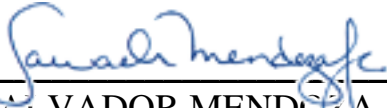
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ORDER ADOPTING REPORT AND RECOMMENDATION AND DIRECTING  
TRANSFER TO NINTH CIRCUIT -- 3

1       **IT IS SO ORDERED.** The District Court Executive is directed to transfer  
2 this case to the Ninth Circuit Court of Appeals. The District Court Executive is  
3 directed to enter this Order, forward a copy to Petitioner and close the file.

4       **DATED** this 27th day of March 2015.

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8       SALVADOR MENDOZA, JR.  
9       United States District Judge  
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